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Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 32

CHRISTIAN F. BRAEN,

Petitioner,

against

PFEIFER OIL TRANSPORTATION COMPANY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT.

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Supreme Court of the United States

OCTOBER TERM, 1958.

No. 706.

CHRISTIAN F. BRAEN,

Petitioner,

against

PFEIFER OIL TRANSPORTATION COMPANY, INC.,

Respondent.

BRIEF FOR RESPONDENT.

Questions Presented.

This case involves the question whether a man who had been employed as a crew member of a barge, who sustains an injury while in the course of performing work as a carpenter having no connection with or relation to the barge upon which he had been employed, may recover damages for such injury in a suit under the Jones Act or whether his exclusive remedy against his employer is under the Longshoremen's and Harbor Workers' Compensation Act.

There is no dispute as to the nature of the work which the petitioner was in the course of performing at the time he sustained his injury—completing the carpentry work in laying a deck on a work raft. Neither is there any dispute as to the manner of the happening of the injury—by falling from the permanently moored work barge *Winisook* to the work raft which was located alongside at respondent's repair yard.

inference under the evidence that an injury so occurring arose out of and in the course of the employment of the petitioner as a seaman and member of the crew of the barge *Pfeifer No. 2.* If there was no evidence from which such an inference could permissibly have been drawn, there can be no doubt that the Court of Appeals acted within its appropriate powers in granting judgment dismissing the complaint. The respondent had reserved its position by motion to dismiss at the close of plaintiff's case (R. 43-44), by motion for a directed verdict at the close of the trial (R. 52-54), and by motion for judgment n.o.v. under Rule 50(b) of the Rules of Civil Procedure.

The fact that the petitioner obtained a jury verdict adds no particular strength to his position. This Court did not hesitate in the recent past to affirm a Circuit Court which reversed a judgment entered in favor of a plaintiff upon a jury's verdict where the facts did not warrant recovery under the Jones Act. *Desper* v. *Starved Rock Ferry Co.* (1952), 342 U. S. 187.

Only if there was evidence giving rise to a permissible inference that plaintiff's injury arose out of and in the course of his employment as a seaman and member of the crew of the *Pfeifer No. 2* does the subsidiary question arise whether the District Court's charge to the jury adequately and properly instructed the jury as to the tests to be applied by them in determining the issue of fact upon the resolution of which petitioner's right to maintain an action under the Jones Act depended. As to this subsidiary issue the Court of Appeals was in unanimous agreement that the charge was inadequate and insufficient in failing to give the jury any test for determining whether the Jones Act was applicable to the plaintiff or not, and in failing to charge defendant's requests at least in substance (R. 74-75).

In petitioner's Statement of the Case it is said that an alleged lay-off of the petitioner "bottomed the employer's contention during the trial that at the time of his injury Braen was not a member of the crew but a shipyard carpenter" (p. 7, Petitioner's Brief). This statement is inaccurate, as is later in effect admitted by petitioner when he concedes that respondent, both in its briefs in the Court of Appeals and in its brief in opposition to the petition for certiorari, has denied that the alleged lay-off was a factor in respondent's contentions (p. 10, Petitioner's Brief).

Reference to the motion to dismiss at the close of plaintiff's case (R. 43-44) and the motion for a directed verdict at the close of the trial (R. 52-54) will show that respondent did not make any contention, even at the trial, that this alleged lay-off was a determinative factor in the case.

By reference to the alleged lay-off petitioner seeks to interject an irrelevant fact issue to escape the very simple question which is involved—whether the nature and character of the work, in the course of performance of which petitioner sustained his injury, affords petitioner a right of action under the Jones Act.

The union contract upon which stress is placed by petitioner (p. 5, Petitioner's Brief) was introduced in evidence by the petitioner in rebuttal (R. 68-69), obviously to contradict the testimony of Edward Smith that he had told Braen on the morning of the accident that he would have to lay him off (R. 46); but this side issue is completely immaterial to the case. All that it has the effect of proving is that petitioner could have refused to do the requested work.

As above pointed out, there is no dispute as to the nature of the work which the petitioner was in the course of per-

forming when his injury was sustained. On the day of the accident, there being more persons engaged aboard the *Pfeifer No. 2* in performing the repair of its pump than were necessary for the job, Edward Smith, a vice president of the respondent in over-all charge of the repair yard, requested petitioner, who had formerly been a carpenter, to finish placing a deck on a raft which was used by the respondent in performing repair work on its vessels (R. 23). The petitioner undertook to do this work and after gathering the necessary tools and equipment proceeded out along the catwalk of the work barge *Winisook* (R. 24) and while attempting to bring the raft in a position where he could board it, fell from the *Winisook* onto the raft (R. 25-26). The work barge *Winisook,* which was in fact a covered lighter, was in effect a floating workshop containing machinery and equipment used in connection with the repair work performed by respondent at the yard where it was located (R. 47-49, 50). The vessel upon which petitioner had been employed as a seaman and member of the crew was the *Pfeifer No. 2* (R. 18-19). Concerning these facts there is no dispute whatever.

There was no evidence whatever in the case that the raft was at the time being used or intended to be used in connection with the work being performed on the *Pfeifer No. 2.* In fact the only evidence on the subject is to the contrary (R. 48).

There is no evidence in this case that the petitioner had ever worked on the raft in connection with making any repairs to the *Pfeifer No. 2.* The only evidence is that when the raft had previously been used in making repairs to the *Pfeifer No. 2,* the petitioner as a member of the crew of the *Pfeifer No. 2* had maintained a lookout on the *Pfeifer No. 2* to protect the workmen on the raft (R. 27).

That the crew of the *Pfeifer No. 2* had to cross the work barge *Winisook* in order to get ashore, since the *Pfeifer No. 2* was moored on the off-shore side of the *Winisook* (p. 6, Petitioner's Brief), is completely irrelevant to the question under consideration; since admittedly petitioner was not using the *Winisook* as a means of egress from or ingress to the *Pfeifer No. 2* at the time of his injury.

ARGUMENT.

POINT I.

Under the undisputed facts of the present case, as a matter of law, the plaintiff was not entitled to maintain suit under the Jones Act.

The Longshoremen's and Harbor Workers' Compensation Act, which was enacted by Congress in 1927, restricted the operation of the Jones Act to a seaman who is "either a master or a member of a crew of the vessel, injured in the course of his employment as such." *Swanson* v. *Marra Bros., Inc.*, 328 U. S. 1, 5.

After the enactment of the Jones Act, this Court in *International Stevedoring Company* v. *Haverty*, 272 U. S. 50, had held that the Jones Act extended to maritime workers, including stevedores, who traditionally perform the work of seamen, when injured in the course of their employment. As pointed out in the *Swanson* case, within six months after the decision in the *Haverty* case, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act, which made exclusive of all other liability of the employer of maritime employees for injuries sustained by such employees on navigable waters in the course of their employment, a liability to pay compensation. The

only maritime employees excluded from the coverage of the Compensation Act, were masters or members of a crew of a vessel. This Court in the *Swanson* case, interpreted the provisions of the Longshoremen's and Harbor Workers' Compensation Act as modifying the Jones Act so as to restrict the benefit of the Jones Act to either a master or a member of a crew of a vessel injured in the course of his employment as such, concluding, after an analysis of the provisions of the Compensation Act, as follows (328 U. S. at pp. 7, 8):

> "We must take it that the effect of these provisions of the Longshoremen's Act is to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters * * *. And it leaves unaffected the rights of members of the crew of a vessel to recover under the Jones Act when injured while pursuing their maritime employment whether on board (citing cases), or on shore. *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36, 87 L. ed. 596; 63 S. Ct. 488, *supra*." (Matter in parentheses supplied.)

In *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, cited in the above quotation, this Court had occasion to consider the right of a member of a crew to recover under the Jones Act for an injury sustained ashore, and held that the right existed despite the place where the injury was inflicted, because of the nature of the seaman's service, his status as a member of the vessel, and his relationship as such to the vessel and its operation in navigable waters. That the decision was so limited is apparent from the language of the Court in that case; and the decision was so interpreted by this Court in the *Swanson* case (328 U. S. at p. 4).

Thus the Court said in the *O'Donnell* case (318 U. S. at p. 42):

"The right of recovery in the Jones Act is given to the seaman as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters. See Waring *v.* Clarke, 5 How (US) 441, 12 L. ed. 226, and New England Mut. M. Ins. Co. *v.* Dunham, 11 Wall. (US) 1, 20 L. ed. 90, supra.

"It follows that the Jones Act, in extending a right of recovery to the seaman injured while in the service of his vessel by negligence, has done no more than supplement the remedy of maintenance and cure for injuries suffered by the seaman, whether on land or sea, by giving to him the indemnity which the maritime law afforded to a seaman injured in consequence of the unseaworthiness of the vessel or its tackle. Pacific S.S. Co. *v.* Peterson, 278 U. S. 130, 73 L. ed. 220, 49 S. Ct. 75, supra. Since the subject matter, the seaman's right to compensation for injuries received in the course of his employment, is one traditionally cognizable in admiralty, the Jones Act, by enlarging the remedy, did not go beyond modification of substantive rules of the maritime law well within the scope of the admiralty jurisdiction whether the vessel, plying navigable waters, be engaged in interstate commerce or not. Cf. Jackson *v.* The Magnolia, 20 How. (U. S.) 296, 15 L. ed. 909; The Belfast, 7 Wall. (U. S.) 624, 640, et seq., 19 L. ed. 266, 270; Re Garnett, 141 U. S. 1, 35 L. ed. 631, 11 S. Ct. 840, *supra*."

Whether or not an employee, the nature of whose work is such as to characterize him as a seaman, is or is not a master or member of a crew of a vessel excluded from coverage under the Longshoremen's and Harbor Workers' Compensation Act and entitled to maintain suit under the

Jones Act, may be at times a question of fact and at other times a question of law. Compare, *South Chicago Coal & Dock Co.* v. *Bassett,* 309 U. S. 251 and *Norton* v. *Warner Co.,* 321 U. S. 565.

The determination as to whether or not a maritime employee who may generally be classified as a seaman, in respect of an injury sustained in the course of his employment, is limited to compensation or may recover indemnity under the Jones Act has been uniformly held to depend upon the nature of the service being performed at the time the injury is sustained. *Nogueira* v. *New York, N. H. & H. R. Co.,* 281 U. S. 128; *Desper* v. *Starved Rock Ferry Co.,* 342 U. S. 187; *Pennsylvania R. Co.* v. *O'Rourke,* 344 U. S. 334.

Neither the definition of the terms "master" or "seaman" as given in other statutes nor the designation given to the employee by his employer, has any relevancy. *Warner* v. *Goltra,* 293 U. S. 155, 160-161; *South Chicago Coal & Dock Co.* v. *Bassett, supra,* at p. 260.

In *Nogueira* v. *New York, N. H. & H. R. Co., supra,* this Court held that a railroad freight handler, who otherwise would have had a right of action under the Federal Employers' Liability Act, and who at the time of his injury was loading freight into railroad cars upon a carfloat attached to a dock, was by virtue of the Longshoremen's and Harbor Workers' Compensation Act limited to the recovery of compensation; for the reason that the Longshoremen's and Harbor Workers' Compensation Act in respect of injuries occurring on navigable waters to employees engaged at the time of injury in maritime employment, superseded and overrode the provisions of the Federal Employers' Liability Act. The Court specifically pointed out that:

"The fact that the same employee of a railroad company may have different rights at different times is a familiar consequence of the application of different laws, as, for example, when the employee of a railroad company is engaged at one time in intrastate commerce and at another time, even on the same day, in interstate commerce; and the application of Federal laws where the employment falls within the Federal jurisdiction is manifestly a matter within the discretion of Congress" (281 U. S. at p. 137).

In *Desper* v. *Starved Rock Ferry Co., supra,* the Court had before it a case involving the death of a man who was killed aboard a moored barge maintained by the respondent as a machine shop, engaged in painting life preservers for use on a small fleet of sight-seeing motor boats. The evidence disclosed that the decedent had an operator's license from the Department of Commerce and had during the prior season been employed as a boat operator; he was to resume his operator's duties when the boats were back in the water. This Court, in affirming the Court of Appeals for the Seventh Circuit, which had reversed a judgment entered in petitioner's favor in the District Court on a jury's verdict, pointed out that the test whether the Jones Act applies to a seaman's injury "depends largely on the facts of the particular case and the activity in which he was engaged at the time of injury" (342 U. S. at p. 190).

In *Pennsylvania R. Co.* v. *O'Rourke, supra,* this Court again emphasized that it is the particular activity in which the injured man is engaged at the time of his injury rather than the nature of his general duties which is determinative of the question whether the Longshoremen's and Harbor Workers' Compensation Act or the F. E. L. A. (or Jones Act) governs the employee's rights for injuries sustained

in the course of his employment. Thus in that case, the Court said (344 U. S. at p. 340):

> "An injured worker's particular activity at the time of injury determines of course whether he was injured in the course of his employment within §902(2), and whether he was a member of the crew of the vessel within the exceptions of §§902(3) and 903(a)(1). This explains the emphasis on the factor of the individual's job in Parker *v.* Motor Boat Sales, Inc., 314 US 244, 245, 246, 86 L. ed. 184, 188, 189, 62 S. Ct. 221, and South Chicago Coal & Dock Co. *v.* Bassett, 309 US 251, 84 L. ed. 732, 60 S. Ct. 544."

As pointed out by this Court in that case, by reference to lower court decisions (see footnotes 6 and 7, 344 U. S., pages 340 and 341), the test of the "particular activity at the time of injury" rather than "the nature of his regular work", as determinative of the injured employee's rights, has been consistently applied by the Circuit and District Courts.

As recently as February 25th, 1957 this Court in *Senko* v. *La Crosse Dredging Corporation,* 352 U. S. 370, 371, again reiterated that "the Longshoremen's and Harbor Workers' Compensation Act * * * restricts the benefits of the Jones Act to 'members of a crew of a vessel' "; adding: "To recover, therefore, petitioner had to be a member of a crew as that term is used in the Longshoremen's Act, at the time of his injury".

Where the evidence is not susceptible of contrary inferences, this Court has repeatedly treated the question whether the injured man's rights afford a remedy under the Federal Employers' Liability Act, the Jones Act, or the Longshoremen's and Harbor Workers' Compensation Act, even in cases brought on the civil side of the court before a

jury, as one of law and has disposed of cases brought before it on that basis. *Nogueira* v. *New York, N. H. & H. R. Co., supra; Desper* v. *Starved Rock Ferry Co., supra; Pennsylvania R. Co.* v. *O'Rourke, supra.*

It is only where the evidence gives rise to permissible contrary inferences that the question has been treated by this Court as one of fact. *Senko* v. *La Crosse Dredging Corporation, supra, Grimes* v. *Raymond Concrete Pile Company,* 356 U. S. 252.

The undisputed facts in the present case allow of no inference that at the time the plaintiff sustained his injury he was engaged in the performance of any work or activity in the course of employment as an officer or member of the crew of any vessel. It is undisputed that plaintiff had been employed by the defendant as a member of the crew of the *Pfeifer No. 2* for approximately four months prior to his injury and that up to a short interval prior to his injury he had actually been engaged in the performance of employment for the defendant as a member of the crew of that vessel. It is equally undisputed, however, that at the time plaintiff sustained his injury, he had ceased to perform any functions in the course of his employment as a member of the crew of the *Pfeifer No. 2,* and was then engaged in the performance of work for his employer as a shipyard carpenter. There is no evidence whatever that the work which plaintiff was performing at the time of his injury had any relationship whatever to the barge *Pfeifer No. 2* upon which he had been employed as a crew member (R. 23). The only evidence on the subject is directly to the contrary (R. 48). Under these circumstances the evidence did not afford a permissible inference that at the time plaintiff sustained his injury, he was engaged in the course of employment as a member of the crew of the *Pfeifer No. 2* and accordingly,

no basis has been laid for the maintenance of suit under the Jones Act to recover for the injury involved.

Petitioner professes confusion (p. 8, Petitioner's Brief) as to the implication of the decision of the Court of Appeals in its conclusion that petitioner "was subject to the Longshoremen's Act, not the Jones Act, since he was not injured in the course of his employment as a seaman or as a member of the crew of the *Pfeifer No. 2*" (R. 73-74). The Jones Act by its terms is applicable to "any seaman who shall suffer personal injury in the course of his employment". The Longshoremen's Act, which this Court has held supersedes and restricts the application of the Jones Act (*Swanson* v. *Marra Bros., Inc., supra*), excludes from its operation not "any seaman" but "a master or member of a crew of any vessel" (33 U. S. C. A., Sec. 903(a)(1)). Thus it is necessary in order that the Jones Act may afford a remedy that the man must be both a seamon and a master or member of a crew of a vessel.

The principle which has uniformly run current through all of the decisions of this Court on the subject is that the particular activity in which a man is engaged at the time of his injury must be looked to, to determine whether he is a seaman and a member of a crew of a vessel as regards the remedy afforded him to recover for such injury. Thus the Court of Appeals in concluding that the man was subject to the Longshoremen's Act and not to the Jones Act, because he was not injured in the course of his employment as a seaman or as a member of the crew of the *Pfeifer No. 2*, involves no difficulty of comprehension.

Petitioner seeks to support his petition by a factitious argument directed against the two disjunctives of the conclusion of the court below. It will be conceded that if the work petitioner was performing at the time of his injury was calculated to further the mission of the vessel (as

stated by petitioner at p. 9 of his brief), that a Jones Act recovery would be available; but there is no evidence whatever in this case that petitioner's work was in any wise calculated to further the mission of the vessel upon which he had been employed as a member of the crew, namely, the *Pfeifer No. 2*. The only evidence is that his work furthered the mission of completing the deck of the work raft, which neither was being or was to be, employed in connection with any work then being performed on or in connection with the *Pfeifer No. 2*.

Petitioner poses quixotic suppositions as to why petitioner was not a seaman at the time of his injury: such as, the alleged lay-off, the place of the accident, and that the *Pfeifer No. 2* was not in transit, which petitioner then proceeds to attack as invalid (p. 10, Petitioner's Brief). There has been no suggestion by the respondent at any time in this case, and there is none in the decision of the Court of Appeals, that any of these supposititious circumstances have anything whatever to do with the decision of this case.

The only contention advanced by petitioner which deserves any consideration is the question posed at the bottom of page 10 and the top of page 11 of Petitioner's Brief, where it is asked whether, if petitioner was in the course of performing the work of a carpenter, placing a deck on a raft in a ship repair yard that takes him out of the class of a seaman. Therein petitioner finally arrived at the nub of the case; and, of course, the question posed must be answered in the affirmative; since although a seaman may have handled carpenter's tools, as contended by the petitioner since the days of the Phoenicians, petitioner was not in the course of doing work as a ship's carpenter but as an ordinary shipyard carpenter.

Similarly in his argument directed against the conclusion that petitioner was not hurt in the course of his employ-

ment as a member of the crew of the *Pfeifer No. 2,* suppositious circumstances are presumed and then attacked. The cases cited at pages 12-13 of Petitioner's Brief would have application if the petitioner's work at the time of his injury was related to the *Pfeifer No. 2*—but it was not. This is apparent from the decision of this Court in *Senko* v. *La Crosse Dredging Corporation, supra,* upon which reliance is so heavily placed by petitioner. That case is clearly distinguishable on its facts; since the work the man was performing at the time had direct relation to the vessel upon which he was employed. The element of the case, which it was argued would take the man out of the operation of the Jones Act, was the place of the occurrence. This had long since been dismissed by this Court as a basis for distinguishing between the application of the Jones Act and the Longshoremen's Act in *O'Donnell* v. *Great Lakes Dredge & Dock Co., supra,* and *Swanson* v. *Marra Bros., Inc., supra.* In *Butler* v. *Whiteman,* 356 U. S. 271, this Court merely held that there were jury questions.

Petitioner seeks to support his position by arguing that the jury could suppose that the raft would be used for the doing of the kind of work which petitioner, as a member of the crew of the *Pfeifer No. 2,* might be called upon to perform from time to time, such as the painting of, or the making of minor repairs to, the *Pfeifer No. 2;* but the proof is that the raft was not being so used and was not at the time contemplated to be so used.

The further argument is made that since the man had received a payment from his employer, which in the question put to him by his attorney was characterized as maintenance and cure (R. 61-62), this was evidence from which an inference could be drawn that petitioner was entitled to maintain suit under the Jones Act, and that his exclusive remedy was not under the Longshoremen's

Act. The only case cited in support of this rather surprising statement is *Pekelis* v. *Transcontinental & Western Air, Inc.*, 187 F. 2d 122 (p. 13, Petitioner's Brief). That case had to do merely with the admission of reports made by employees of the defendant and adopted by the defendant, as admissions against interest. Its relevance here is difficult to comprehend.

It is not until petitioner arrives at the last sub-heading under his Point I that he reaches the real question involved in this case, wherein he argues that: "The nature of Braen's services when injured is irrelevant to his right to a remedy under the Jones Act" (p. 14, Petitioner's Brief). The case in this Court upon which principal reliance in support of this contention is placed is *Senko* v. *La Crosse Dredging Corporation*, *supra*. The quotation given from that case, at page 18 of Petitioner's Brief, clearly shows that the *Senko* case does not in the least depart from the consistent principle uniformly applied in cases involving the question here presented; wherein this Court has stressed over and over again that coverage under the Jones Act depends upon the happening of an injury to a crew member engaged in the course of his employment as such at the time of injury. That is not the case here. Here the work that petitioner was doing had no relation whatever to his employment as a member of the crew of the *Pfeifer No. 2*.

The only other cases from this Court cited under this sub-heading are, *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, 249, *South Chicago Coal & Dock Co.* v. *Bassett*, *supra*, and *Swanson* v. *Marra Bros., Inc.*, *supra*, which are cited for the proposition that the Longshoremen's and Harbor Workers' Compensation Act "was never intended to affect or limit in the slightest the traditional rights and remedies of seamen, members of a crew". Of course, the

Jones Act is not one of the traditional rights and remedies of seamen, members of a crew, but a comparatively recent statutory remedy.

The *Parker* case upheld an award in compensation under the Longshoremen's and Harbor Workers' Compensation Act. The questions involved were, whether the man's death arose in the course of his employment, and whether recovery was barred because recovery could have been had through Workmen's Compensation proceedings provided by State law. There is nothing in the case touching on the question here involved, other than the stress which was placed in the decision upon the factor of the work being performed by the decedent at the time of his death, as noted by this Court in *Pennsylvania R. Co.* v. *O'Rourke, supra*, (344 U. S. at p. 340).

South Chicago Coal & Dock Co. v. *Bassett, supra*, also involved an award in compensation under the Longshoremen's Act for the death of a man who was drowned "while serving his employer on a vessel in navigable waters of the United States". The Commissioner had found that the man was not a member of a crew of a vessel within the exception in the Compensation Act. This finding was reversed by the District Court, the District Court was in turn reversed by the Circuit Court, and the question considered by this Court was whether or not there was evidence in the record before the Compensation Commissioner to sustain his finding. Contrary to the contention of the petitioner, the case very definitely again makes it plain that the Longshoremen's and Harbor Workers' Compensation Act supersedes and restricts the operation of the Jones Act. Thus in that case this Court said (309 U. S. at p. 256):

> "For those employees who are entitled to compensation, the remedy under the Act is exclusive.

§5. This made inapplicable to such employees the provision of §33 of the Merchant Marine Act (called the Jones Act) which carried to 'seamen' at their election the benefit of the provisions of the Federal Employers' Liability Act".

Swanson v. *Marra Bros., Inc., supra,* specifically involved the question whether one performing work which had previously been held by this and lower courts to be seamen's work could, notwithstanding the enactment of the Longshoremen's and Harbor Workers' Compensation Act, maintain a suit under the Jones Act for an injury sustained in the course of his employment. This Court specifically rejected that contention. (See the quotation from the *Swanson* case at p. 6, *supra.*) At least three times in that decision did this Court specifically note that the effect of the Longshoremen's Act was to restrict or limit the application of the Jones Act to injuries sustained by an employee who is either a master or member of a crew when injured in the course of his employment as such.

In none of the cases cited by petitioner is there the slightest suggestion that the Longshoremen's Act did not have the effect of restricting the operation of the Jones Act.

There is no more reason in logic and principle why the Longshoremen's Act, which supersedes and restricts the effect of the Jones Act, is not applicable to the case of a man, whose usual work is that of a seaman and whose general employment is that of a member of a crew, when an injury occurs in the performance of a service not that of a seaman or a member of a crew of a vessel, than there is that an injury affecting a man whose usual work is not that of a seaman and who is not generally employed as a member of a crew, may have a Jones Act remedy because

the particular activity in which he was engaged at the time of his injury is that of a seaman and member of a crew, thus excluding him from recovery under the Longshoremen's and Harbor Workers' Compensation Act.

Neither is there any more reason in logic and principle why the Longshoremen's Act should be held to provide the sole remedy in the case of a man whose general employment is that of a railroad freight handler (*Nogueira* v. *New York, N. H. & H. R. Co., supra*), or a brakeman (*Pennsylvania R. Co.* v. *O'Rourke, supra*), and whose usual remedy would be under the Federal Employers' Liability Act, than there is for holding the Longshoremen's Act the exclusive remedy, because of the particular activity in which the man was engaged at the time of his injury, in the case of a man who, if performing his usual functions, would have a remedy under the Jones Act.

What is there in the Jones Act, which incorporates and embodies the Federal Employers' Liability Act, to make the Jones Act more sacrosanct than the Federal Employers' Liability Act? Why should not the Longshoremen's Act similarly restrict the Jones Act to which it is more directly related, as it does the Federal Employers' Liability Act to which it is more remotely related?

Unless this Court is now prepared to reverse the clearly defined principles which have uniformly pervaded its decisions dealing with the application of the Longshoremen's and Harbor Workers' Compensation Act, vis-a-vis the Jones Act and the Federal Employers' Liability Act since the enactment of the Longshoremen's Act, it is respectfully submitted that the decision of the Court of Appeals reversing the judgment of the District Court and dismissing the complaint must be affirmed.

POINT II.

The District Court failed to adequately and properly instruct the jury and erred in denying defendant's requests to charge.

Assuming, *arguendo,* that it would have been permissible under the facts disclosed in this case for the jury to draw an inference that plaintiff at the time he sustained his injury was performing work in the course of his employment as a member of the crew of the *Pfeifer No. 2* as such, it was necessary for the jury to have some norm which they could apply to determine whether they should or should not draw such inference. The District Court gave the jury no instructions on the subject other than the following (R. 5):

> "Whether or not at the time of the accident he was engaged in functions which are normally performed by a member of the crew, and as he stated, some functions he gave in detail, that he did perform various functions prior to the date of the accident, are for you to determine."

The plaintiff had testified that prior to his injury when his boat was at the repair yard, he had at times worked on land in the yard and at other times on the *Winisook:* "Wherever we were ordered to go, we went" (R. 28). There had also been testimony that during the time he had been employed by the defendant, he was always carried on the payroll of the barge (R. 39). Under the instructions as given by the Court, the jury might well have inferred that if the plaintiff had at other times done work around the yard not in connection with the maintenance of the *Pfeifer No. 2,* since he was carried on the payroll of the

barge during such periods, this would be sufficient for them to infer that at the time of his injury he was actually engaged in the course of his employment as a member of the crew of the *Pfeifer No. 2.* Under the law, as is well established by the cases referred to in our preceding point, particularly *Swanson* v. *Marra Bros., Inc., Nogueira* v. *New York, N. H. & H. R. Co., Desper* v. *Starved Rock Ferry Co.* and *Pennsylvania R. Co.* v. *O'Rourke,* the performance of such functions on other occasions while carried on the barge payroll, would not entitle plaintiff to be deemed an officer or member of the crew of a vessel entitled to maintain suit under the Jones Act for the injury in suit.

To make matters even worse in the present case, the Court had prefaced the instruction quoted above with the following statement (R. 5):

> "While it seemed at the outset to be some question as to whether or not he was a member of the crew, it does not seem to be seriously disputed that *at the time of the accident* he was a member of the crew." (Italics supplied.)

This had been a seriously disputed issue throughout the trial. It had been made the basis of a motion to dismiss at the close of plaintiff's case (R. 43-44). It had again been made the basis of a motion for a directed verdict at the close of the entire case (R. 52-54). It was the basis of specific requests to charge submitted to the Court by the defendant (R. 10-11). The fact that when exception was taken to that part of the Court's charge (R. 9), the Court before dismissing the jury said: "Apparently according to the defendant's statement, he says that is a serious issue. So I will leave that as an issue" (R. 10), hardly served to correct the effect of the charge; for it still left the jury without any norm or basis to determine whether

or not plaintiff at the time of his injury was engaged in the course of employment as a member of the crew of the barge *Pfeifer No. 2.* This was specifically called to the Court's attention by exception (R. 9) and exception was also taken to the failure of the court to charge any of the defendant's requests (R. 9-10).

We submit in the instant case the purpose of Rules 51 and 46 F. R. C. P., to inform the trial judge of possible errors and to clearly advise it as to the question of law involved has been adequately fulfilled. *United States* v. *General Motors Corporation,* 226 F. 2d 745, 750; *Montgomery* v. *Virginia Stage Lines, Inc.,* 191 F. 2d 770. The Court in *Montgomery* v. *Virginia Stage Lines, Inc.,* said (at page 772):

> " '* * * It has long been the rule that, as against a mere general or abstract charge, a party is entitled to a specific instruction on his theory of the case, if there is evidence to support it and if a proper request for such an instruction is made. * * *' Chicago & N. W. Ry. Co. *v.* Green, 8 Cir., 1947, 164 F. 2d 55, 61; see, also, Cobb *v.* Capital Transit Co., 1945, 79 U. S. App. D. C. 364, 148 F. 2d 217; Feldmann *v.* Connecticut Mut. Life Ins. Co., 8 Cir., 1944, 142 F. 2d 628, 631. Though the requests were not entirely correct as instructions on the case as a whole, the gist of them was sufficiently important and clear to require their substance to be given.
>
> " 'While a party may not complain of the refusal of a requested instruction which does not correctly state the law, the court being under no obligation to reframe a request so as to contain an accurate statement of the law, yet where, as here, the meaning of a request is reasonably apparent, and its subject-matter is important and not sufficiently covered by the general charge, a court would not be justified in ignoring the request merely because susceptible of

such an interpretation as to make its proposition not absolutely accurate.' * * * Rothe *v.* Pennsylvania Co., 6 Cir., 1912, 195 F. 21, 25; to like effect are E. I. Du Pont De Nemours & Co., *v.* Frechette, 8 Cir., 1947, 161 F. 2d 318, 323; Pfotzer *v.* Aqua Systems, 2 Cir., 1947, 162 F. 2d 779, 783; and Chicago & N. W. Ry. Co. *v.* Green, supra. Compare Capital Traction Co. *v.* Copland, 1917, 47 App. D. C. 152, 162."

We feel that in the present case the defendant's requests were perfectly correct and appropriate to the case under the facts as developed. They served to highlight the real issue in the case and to call to the attention of the jury the elements which it was necessary for them to consider (if an inference favorable to the plaintiff could be drawn from the facts of the case) in order to draw a correct inference under the law. But even if the requests were not entirely correct, as instructions on the case as a whole, as said by the Court of Appeals for the District of Columbia in the above quotation, "the gist of them was sufficiently important and clear to require their substance to be given". In this case, the subject matter was, as stated in the foregoing quotation, "important and not sufficiently covered by the general charge"; and accordingly, the Court was not "justified in ignoring the requests merely because susceptible of such an interpretation as to make its proposition not absolutely accurate".

Certainly it is true that under the decisions of this Court in *Nogueira* v. *New York, N. H. & H. R. Co., Desper* v. *Starved Rock Ferry Co.,* and *Pennsylvania R. Co.* v. *O'Rourke,* the mere fact that the plaintiff had been a seaman and member of the crew of the *Pfeifer No. 2* prior to his injury did not in and of itself entitle him to a recovery in this case (Request No. 1, R. 10). Clearly, it is true also

under all of the cases cited in our preceding point that it is the nature and character of the work being performed at the time the injury is sustained which is determinative of whether or not the plaintiff is entitled to a recovery (Request No. 2, R. 11). Since the plaintiff in the instant case in order to be entitled to recover from the defendant under the Jones Act, must have sustained his injury in the course of employment as an officer or member of the crew of a vessel, and the only vessel of which he claimed to be a crew member was the *Pfeifer No. 2,* the work which he was performing had to be related to the navigation of the *Pfeifer No. 2* (Request No. 3, R. 11).

It has uniformly been held that for an employee to be considered a member of a crew of a vessel, his work must be of such character as naturally or primarily to aid in navigation, and not a service such as that of laborers of the sort performed by harbor workers. In *Senko* v. *La Crosse Dredging Corp., supra,* where this Court reversed the Fourth District Appellate Court of Illinois on the ground that there was evidence to support the jury's finding that petitioner was a member of the crew performing service as such at the time he sustained his injury, the jury's finding had been made "under specific instructions not objected to" (352 U. S. at p. 372). Not only in this Court, but also in the lower Courts has it uniformly been held that the service being performed out of which the injury arises must be related in some way to navigation for the injured employee to be considered a crew member at the time of his injury. See for example, *Seneca Washed Gravel Corporation* v. *McManigal,* (C. A. 2) 65 F. 2d 779; *Hawn* v. *American S. S. Co.,* (C. A. 2) 107 F. 2d 999; *Antus* v. *Interocean S. S. Co.,* (C. A. 6) 108 F. 2d 185; *Long Island R. Co.* v. *Lowe,* (C. A. 2) 145 F. 2d 516.

Defendant's Request No. 4 (R. 11), which was an application of the rule to the particular facts of the instant case, or substantially a similar charge, directing the attention of the jury to the particular fact findings which it was necessary for them to be able to make in order to grant plaintiff a verdict in this case, was not only appropriate but, it is respectfully submitted, absolutely necessary. Without such a charge, in view of the very general charge on the subject given by the Court which established no guide or norm to aid the jury, the jury was left free to award a verdict on the basis of their own notions without any basis in law to support that verdict.

Petitioner asserts that respondent's Request No. 1 was properly denied because it was in the negative, posing other negatives which might have been suggested although wholly inapplicable to the case (p. 20, Petitioner's Brief). In the instant case petitioner had been employed as a seaman on board the *Pfeifer No. 2* for a substantial period of time up to but briefly before his accident. There was evidence that because of a union contract he could not be disassociated from such employment status without three days' advance notice. There was evidence from which the jury could find his payroll classification had not been changed prior to his injury. Under all these circumstances, unless it was made clear to the jury that the mere fact that he had been a seaman and member of the crew of the *Pfeifer No. 2* prior to his injury was not determinative of his right to maintain suit under the Jones Act, there was ample evidence from which the jury might *incorrectly* infer that the mere fact that he had the employment status of a seaman and member of the crew of the *Pfeifer No. 2* prior to his injury was sufficient to enable him to maintain his action and entitle him to recov-

ery. This is particularly true in the instant case because the Court in its charge said: "It does not seem to be seriously disputed that at the time of the accident he was a member of the crew", and left the question to the jury whether he was entitled to maintain his action upon the sole test of functions which the man had himself testified he had on prior occasions performed (even though not related to the maintenance of the *Pfeifer No. 2*) while being carried on the payroll as a crew member (R. 5). Thus the jury might well have inferred that it was sufficient for them to determine that he had been a seaman and member of the crew of the *Pfeifer No. 2* prior to his accident in order to entitle him to have a verdict in this case.

Petitioner dismisses respondent's Request No. 2 as being general and abstract and in any event as having been substantially charged (p. 21, Petitioner's Brief). This is obviously not so. There is nothing in the charge to indicate to the jury that the nature and character of the work being performed was an essential fact for determination in connection with petitioner's right to a verdict. Moreover, Request No. 2 must be taken together with Request No. 3 which points up the correct application of the pertinent law, that unless the work being performed was in connection with the furtherance of the navigation of the vessel upon whose payroll petitioner was carried as a crew member, there would be no legal basis for a petitioner's verdict. That the work must be related in some way to navigation, for the injured employee to be considered a crew member engaged in the course of his employment as such at the time of his injury and thus entitled to maintain suit under the Jones Act is thoroughly established as has been previously demonstrated.

Petitioner attacks respondent's Requests Nos. 3 and 4 because they use the term "navigation", arguing that this is a term of art incomprehensible to the layman-juror. The argument is spurious both in conception and in presentation. The context of the charge obviously did not relate to the "art or science of laying out a ship's course" (p. 21, Petitioner's Brief). The word in the context of the requests obviously referred to the vessel's being continued in operation as a navigating vessel. The vessel was in the repair yard to repair a pump in order that she could be continued in use.

Clearly, we submit, respondent's Request No. 4, which applied the law to the undisputed facts of the case and left it to the jury to consider whether the work being performed by the petitioner at the time was being done "for the purpose of furthering the repair of the *Pfeifer No. 2* in order to enable it to continue in navigation" was appropriate under the facts of this case. Its denial clearly deprived the respondent of a proper submission of the case to the jury.

Conclusion.

The judgment of the Court of Appeals for the Second Circuit should be affirmed, or if reversed, the case should be remanded to the District Court for a new trial.

Respectfully submitted,

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